Supreme Court, U.S.
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No. 99-1987

IN THE

Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

ANGELICA ROSE PALANK,

Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

CSX Transportation's petition for certiorari asks the Court to review this case to decide whether *lawful* out-of-state conduct can serve as the basis for an award of punitive damages. In fact, punitive damages were awarded against CSX for *unlawful* disregard of federal safety regulations and for fraudulent reporting.

Irrespective of how one characterizes CSX's conduct, it is clear from the briefs and decision below that CSX (1) did not include its constitutional claims in its petition for review in the Supreme Court of Florida, (2) did not raise its Commerce Clause argument in the Florida District Court of Appeal, and (3) did not assert its Due Process claim in timely

fashion in the trial court. As a result, the issues CSX asks this Court to decide were never passed on by the courts below.

Finally, the conflict that CSX invokes to justify a grant of certiorari here does not really exist. It consists almost entirely of a disagreement in dicta between a Tenth Circuit opinion and a decision of the Florida District Court of Appeal in another case. Moreover, that theoretical difference of opinion is not even implicated by this case. What happened here was merely what this Court expressly said was permissible in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 n.21 (1996): Out-of-state conduct was placed before the jury because it was "relevant to the determination of the degree of reprehensibility of the defendant's conduct." Every court that has considered the issue since *Gore* – including the Tenth Circuit – has agreed that such use of out-of-state conduct is constitutionally permissible.

STATEMENT

A. The Accident

Respondent Angelica Palank is the widow of Paul Palank, who was a Florida resident. Mr. Palank was killed on July 31, 1991, when the train on which he was a passenger derailed on tracks owned and maintained by petitioner CSX, a company headquartered in Jacksonville, Florida. The deceased's trip began in Hollywood, Florida, traveled virtually the full length of Florida, and ended with the derailment in South Carolina. It was stipulated that the accident was caused by a switch that malfunctioned as the train passed over it, sending cars at the back of the train off onto a different track from the lead cars. Tr. 6754.[1] Eight passengers were killed, and 90 passengers and crew members were injured. Tr. 7691.

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[1] "Tr." is the transcript of the trial proceedings.

B. The Trial

Mrs. Palank brought suit against CSX in a Florida state trial court on behalf of herself, her children, and her husband's estate. Because CSX did not contest liability for compensatory damages, the trial proceeded, at CSX's request, in three phases: a first phase to set the amount of compensatory damages; a second phase to determine whether punitive damages were warranted; and a third phase to determine the amount of punitive damages. The first phase resulted in a compensatory damages verdict of over $6 million, which is not at issue here. *See* Pet. App. 4a. In the second phase, a different jury held CSX liable for punitive damages, and in the third phase, the jury set the amount of punitive damages at $50 million. *Id.* CSX identifies Mrs. Palank personally as the sole respondent in this case, but the punitive damages were awarded only to her husband's estate.

The evidence presented at the second phase of the trial showed that the cause of the accident was a broken crosspin in the switch. The switch had been broken for seven months, and an adequate safety inspection at any time during that period would have detected the problem. Although CSX personnel were aware that there was some problem with the switch, they did not conduct an adequate inspection. Pet. App. 7a, 35a.

The evidence presented during the second phase of the trial further established that CSX's failure to inspect the switch where the accident occurred was a part of a larger pattern of reckless disregard for adequate safety inspections, failures to comply with federal safety regulations, and false reporting that adequate inspections had been performed – a pattern that was manifested not only in the area where the accident occurred, but throughout CSX's system. The evidence showed that this pattern of corporate recklessness and indifference to proper safety procedures was the result of a massive downsizing of CSX's inspection and maintenance

crews across the country, undertaken to cut costs and increase profits. *See* Pet. App. 7a-11a, 20a-21a, 26a-29a, 34a-35a.

Mrs. Palank's counsel did not argue that CSX should be punished for lawful conduct or personnel reductions. Rather, counsel for Ms. Palank relied on this evidence in arguing to the jury during the second phase that CSX had put profits ahead of concern for human lives. *E.g.*, Pet. 3. Counsel for CSX did not object to these arguments (or, indeed, to any of the arguments quoted in the petition for certiorari).

CSX did not ask that the jury be instructed during the second phase of the trial that it could not consider CSX's out-of-state manpower reductions in determining whether to award punitive damages. Only after the jury had determined that punitive damages should be awarded and the case moved on to the third phase for the determination of the amount of such damages, did CSX request that the jury be instructed that it could not impose punitive damages for the purpose of deterring CSX from engaging in "lawful" conduct outside Florida. The court rejected CSX's request as untimely. Tr. 13843.

After the third phase of trial ended with the jury's award of $50 million in punitive damages, CSX moved to set aside the judgment on the ground that it was excessive. The trial judge denied the motion, stating (Pet. App. 34a):

> This Court finds the evidence to be clear and convincing, sufficiently showing that Defendant's conduct in breaching its duty, was deliberate, reckless, willful, and wanton, evincing a reckless disregard for the safety of rail passengers and the public at large. The evidence showed that although cost-cutting measures may have saved [the] Defendant over two billion dollars, society paid the cost with eight human lives. The clear and convincing evidence showed that the price of cost-cutting safety

to turn over larger profits it too great of a price. This not only bespeaks culpable negligence, it is borderline criminal.

C. The Appeal

CSX appealed, raising primarily state-law issues relating to the size of the verdict, Florida's statutory presumptive cap on punitive damages, and evidentiary issues. The argument headings in CSX's Initial Brief in the District Court of Appeal were:

I. As a Matter of Law the Evidence Does Not Support an Award of Punitive Damages

II. CSXT Is Entitled to a New Trial

III. A Substantial Remittitur Is Required

As one of several challenges to the jury instructions, CSX said the following in a footnote in the section requesting a new trial (Appellants' Initial Brief, p. 43 n.39):

> The failure to give the additional requested instructions violated not only Due Process, but also defendant's Equal Protection rights under the United States Constitution. *See, e.g., Mattison*, 947 F.2d at 101 n.3. The jury verdict also offended federal interests in prohibiting states from unduly burdening interstate commerce and imposing the state's regulatory policies on the nation. *See Gore*, 517 U.S. at 585.

In response, Ms. Palank's brief stated (Answer Brief of Appellees, p. 46; citations omitted):

> It is clear [that] CSX has waived its right to challenge the liability verdict on federal constitutional grounds since it never requested jury instructions along those lines, nor objected to Plaintiff's proposed instructions

on that basis. Also, the fact that CSX made no federal constitutional arguments during the liability trial waived its rights to make those arguments on appeal.

The Florida District Court of Appeal affirmed. Finding that the evidence as a whole showed reckless disregard of passenger safety, the court held that punitive damages were justified under Florida law and that the circumstances were egregious enough to support an award exceeding the statutory cap (Pet. App. 3a-16a). The court's opinion did not even mention CSX's federal constitutional claim.

CSX petitioned the Florida Supreme Court for discretionary review, asserting as a basis for jurisdiction only that the Court of Appeal's decision conflicted with other Florida decisions. CSX's petition did not invoke the Florida Supreme Court's jurisdiction to review Court of Appeal decisions resolving issues of federal constitutional law. The Florida Supreme Court denied review without comment.

REASONS FOR DENYING THE WRIT

I

THE FEDERAL QUESTIONS CSX ASKS THIS COURT TO REVIEW WERE NEITHER PROPERLY PRESENTED TO NOR DECIDED BY THE FLORIDA STATE COURTS

A. No Constitutional Issue or Federal Question Was Presented to the Florida Supreme Court.

This Court's certiorari jurisdiction over state-court judgments under 28 U.S.C. § 1257 extends only to decisions that resolve questions of federal law. "It is well settled that this Court will not review a final judgment of a state court unless 'the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.'" *Board of Directors of Rotary*

Int'l v. Rotary Club of Duarte, 481 U.S. 537, 550 (1987) (quoting *Webb v. Webb*, 451 U.S. 493, 496-97 (1981)). *Accord, e.g., Adams v. Robertson*, 520 U.S. 83, 86-87 (1997). A petitioner seeking this Court's review of a state-court judgment must show that the state court system had "a fair opportunity to address the federal question that is sought to be presented here." *Id.* at 87 (quoting *Webb v. Webb*, 451 U.S. at 501).

A litigant who bypasses his chance to present a federal issue to a state supreme court through a petition for discretionary review has failed to give the state courts a "fair opportunity" to address the issue. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999). *See also Banks v. California*, 395 U.S. 708 (1969); *Stembridge v. Georgia*, 343 U.S. 541 (1952). A petitioner may not "draft his own rules of procedure in order to raise the [federal] claim only before those [state] courts which he deems appropriate." *Costarelli v. Massachusetts*, 421 U.S. 193, 197 (1975). If the issue can be heard in the state supreme court, the petitioner must raise it there. *Id.*

CSX states that "[t]he Supreme Court of Florida denied review" of the District Court of Appeal's opinion – implying that CSX had actually sought review of the constitutional issues it now raises. Pet. 7. What CSX fails to mention, however, is that its petition for discretionary review by the Florida Supreme Court did not invoke that court's jurisdiction to resolve any federal constitutional issues.

CSX's brief on jurisdiction in the Florida Supreme Court requested only that the court exercise its jurisdiction under that court's Rule 9.303(a)(2)(A)(iv) to resolve a supposed conflict between the Court of Appeal's decision and other Florida decisions *on matters of state law*. The words "Due Process" and "Commerce Clause" do not even appear in CSX's papers in the Florida Supreme Court. Nor is there any

other indication that CSX's petition sought to raise a federal issue before that court.

B. Federal Issues Were Neither Properly Raised Nor Decided in the Lower Florida Courts.

The decision of the District Court of Appeal can be searched in vain for any mention of the constitutional issues that CSX asks this Court to address. CSX disingenuously suggests that the Court of Appeal rejected its constitutional claims in reliance on its own prior decision in *Owens-Corning Fiberglas Corp. v. Ballard*, 739 So. 2d 603 (Fla. App. 1998), *aff'd*, 749 So. 2d 483 (Fla. 1999).[2] But the only mention of *Ballard* in the Court of Appeal's opinion in this case was a citation concerning a purely state-law issue: the standard under a Florida statute for granting a remittitur of a punitive damages award (Pet. App. 12a). The court's citation of *Ballard* plainly had nothing to do with either constitutional issue CSX now raises. Nor is there anything else in the court's opinion that so much as adverts to such issues.

"This Court has frequently stated that when 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'" *Webb v. Webb*, 451 U.S. at 495 (quoting *Street v. New York*, 394 U.S. 576, 582 (1969)). *Accord, e.g., Campbell v. Louisiana*, 523 U.S. 392, 403 (1998); *Board of Directors v. Rotary Club*, 481 U.S. at 550. CSX cannot overcome this presumption.

As to its Commerce Clause arguments, CSX's petition relies on the statement in its brief in the Court of Appeal that

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[2] The Florida Supreme Court's affirmance in *Ballard* did not reach the federal constitutional issue because the defendant in the case, like CSX, did not present the issue to that court.

"[t]he jury verdict also offended federal interests in prohibiting states from unduly burdening interstate commerce and imposing the state's regulatory policies on the nation.. *See Gore*, 517 U.S. at 585." (Pet. 5.) But the quoted language comes from a *footnote* in CSX's appeal brief. Moreover, this single sentence in a footnote – which does not even contain the words "Commerce Clause" – is the *only* place in either CSX's principal brief or its reply brief where commerce-related concerns are alluded to.

Such passing references to constitutional issues do not, by this Court's standards, preserve a constitutional claim in a state appellate proceeding. "A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77 (1988). *See also Webb v. Webb*, 451 U.S. at 496 (holding that a brief reference in the state court to "full faith and credit" did not preserve a claim under the Full Faith and Credit Clause); *DeBacker v. Brainard*, 396 U.S. 28, 32 (1969) (holding that a "passing reference" to an issue in state court briefs did not properly preserve the issue for review).

Florida courts have also repeatedly held that referring to an issue "only by way of a footnote" "does not elevate the matter to a point on appeal." *Simkins Indus., Inc. v. Lexington Ins. Co.*, 714 So. 2d 1092, 1093 (Fla. App. 1998). *Accord, e.g., Coolen v. State*, 696 So. 2d 738, 742 n.2 (Fla. 1997); *Kaufman v. Bernstein*, 100 So. 2d 801, 803 (Fla. 1958); *Vaughn v. Vaughn*, 714 So. 2d 632 n.1 (Fla. App. 1998). In light of this clear Florida rule (which is in accord with the generally accepted appellate principle that "arguments raised only in a footnote or in a perfunctory manner are waived," *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 61 n.17 (1st Cir. 1999)), it is apparent that the reason the Court of Appeal did not pass on the

Commerce Clause issue is that no such issue was properly presented to it.

Nor was CSX's constitutional claim under the Due Process Clause and *BMW v. Gore* preserved in the trial court. Evidence of CSX's "out-of-state conduct," which CSX now contends cannot be used as the basis for an award of punitive damages, was presented to the jury during the second phase of the trial, during which the jury considered whether an award of punitive damages was justified. At that time, CSX did not object on Due Process grounds. Nor did it propose that the jury be instructed that it could not base its decision whether to impose punitive damages on out-of-state conduct. Only after the jury had decided to award punitive damages and the trial had moved to the next phase, during which the amount of damages was considered, did CSX belatedly propose instructions that the jury could not base a decision to award punitive damages on out-of-state conduct. The trial judge denied the instructions as untimely.

Hence, the Court of Appeal's failure to address CSX's federal constitutional claims appears to rest on the conclusion that they had not been properly preserved. *See Campbell v. Louisiana*, 523 U.S. at 403; *Webb v. Webb*, 451 U.S. at 495-96. This procedural basis for the court's decision precludes review in this Court.

II

THE PUNITIVE DAMAGE AWARD WAS BASED ON CSX'S UNLAWFUL VIOLATIONS OF SAFETY REGULATIONS AND NOT ON ITS "LAWFUL PERSONNEL REDUCTIONS"

CSX's question presented asks this Court to determine whether the Due Process and Commerce Clauses permit it to be subjected to punitive damages by the State of Florida for lawful out-of-state conduct. But that question is not remotely

posed by this case. CSX cannot pretend that it was punished in this case under Florida law for engaging in "lawful personnel reductions in other states." Rather, it was punished for conscious disregard of passenger safety in violation of federal regulations – conduct that was part of a nationwide pattern resulting in large measure from CSX's profit-motivated "downsizing" of the personnel who carried out safety inspections. Such a pattern of recklessness and disregard of the safety of passengers is not "lawful" anywhere.

The evidence credited by the jury in this case established (1) that CSX did not inspect the mainline switch for more than seven months, in flagrant violation of a federal regulation (49 C.F.R. § 213.233) that requires inspection twice a week, (2) that CSX filed reports with the Federal Railroad Administration ("FRA") in which it falsely certified that the tracks had been inspected when, in fact, it knew they had not, and (3) that CSX's reports to the FRA deliberately underreported derailments and accidents. An FRA audit of CSX's Baltimore Division had specifically alerted CSX to systemic problems, including derailments, resulting from inadequate inspections due to reduction of maintenance personnel, but CSX had taken no corrective actions.

CSX's "personnel reductions" may have been among the reasons why this recklessness and false reporting occurred, but the reductions were not themselves the grounds for imposition of punitive damages. The "kind[s] of efficiencies" (Pet. 14) that Congress contemplated in restructuring the nation's rail system did not include skipping inspections and false reporting – conduct which is unlawful in every state.

The judgment that CSX is challenging in this case vindicates federal safety policies. If CSX's deliberate decision to reduce its maintenance-of-way personnel by 50 percent and to forbid overtime by its employees produced

this dangerous situation, that does not entitle CSX to claim immunity on the ground that it did no more than implement a "lawful personnel reduction."

III

THERE IS NO CONFLICT OF DECISIONS

CSX argues that the Court should take this case because there is a conflict of authority over the question of whether a state court may award punitive damages based upon unlawful conduct in another state. The allegedly conflicting authorities marshalled by CSX are, on one side, *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634 (10th Cir. 1996), *cert. denied*, 520 U.S. 1241 (1997), and *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539 (Ind. App. 1999), *cert. denied*, 120 S. Ct. 1424 (2000); and, on the other side, the Florida District Court of Appeal's decision in *Owens-Corning Fiberglas Corp. v. Ballard, supra.*

But the Florida court did not purport to apply its decision in *Ballard* to this issue in this case. It rejected CSX's position with no discussion at all, probably because the issue had not been preserved. *See* pp. 8-10, *supra.*

Moreover, there is, in fact, no true conflict that justifies the intervention of this Court. This Court's Rule 10(b) states that one circumstance favoring a grant of certiorari is the existence of a conflict between a federal court of appeals and a state court *of last resort*, or between two state courts *of last resort*. Conflicts involving state intermediate appellate courts, where the relevant state courts of last resort have not yet had occasion to decide an issue, are like conflicts between federal district courts – not adequate reason for the Court's review.

In any event, the conflict, upon inspection, turns out not to be a real one. In *Continental Trend Resources*, the Tenth Circuit was faced with the argument that a punitive damages award in a lawsuit arising out of tortious conduct in

Oklahoma was improperly based in part on the defendant's similar misconduct in other states. The *holding* of the Tenth Circuit was that because the evidence had "focused on [the defendant's] Oklahoma activities" (101 F.3d at 637), there was no reason to believe that the defendant had been punished for out-of-state activities, and no need for the jury to have been instructed to limit its consideration to conduct in Oklahoma. *Id.* at 638. In light of this holding, the court's observation that it "read the opinion [in *Gore*] to prohibit reliance upon inhibiting unlawful conduct in other states" (*id.* at 637), was pure dictum. And even that non-dispositive observation was tempered by the court's simultaneous recognition – applicable to this case – that "[o]ut-of-state acts may be used to show the degree of reprehensibility of a defendant's conduct." *Id.* at 638.

The Florida District Court of Appeal's comments on the subject of out-of-state conduct in the *Ballard* case were, similarly, dicta. In *Ballard*, a Florida resident suffering from terminal lung cancer brought suit against the asbestos manufacturer whose products had caused his disease. The defendant argued on appeal that because the plaintiff had been exposed to its products only in other states before he moved to Florida, the Florida courts could not award him any punitive damages even though the defendant's conduct had been unlawful in the states where it occurred. Discussing this improbable extension of *Gore*, the District Court of Appeal quoted the Tenth Circuit's opinion in *Continental Trend Resources* and noted that it did not "find *Continental*'s interpretation of *BMW* helpful or persuasive." *Ballard*, 739 So. 2d at 606. But the court did *not* rest its decision on its disagreement with the *Continental Trend* dictum. Rather, the Florida court held that the defendant had waived its argument by stipulating before trial that the plaintiff's entitlement to punitive damages was an issue for the jury to decide.

As for the Indiana Court of Appeals' decision in *Ammerman*, it merely held that it was inappropriate under

BMW v. Gore for a jury to award punitive damages that were calculated by adding up the defendant's profits in out-of-state transactions. That, of course, is not what occurred in this case (nor was it the issue in either *Ballard* or *Continental Trend*). And nowhere did the court in *Ammerman* suggest that it was improper to consider that the over-all pattern of the defendant's conduct – including out-of-state conduct – indicated that the defendant had adopted a conscious policy of engaging in unsafe practices to increase its profits.

Finally, in a recent decision overlooked by CSX, the United States Court of Appeals for the Tenth Circuit – the very court that CSX uses as the poster child for its claim of a conflict – has held directly that a jury may consider the reprehensibility of a defendant's unlawful conduct in other states when awarding punitive damages. The decision, *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235 (10th Cir. 2000), involved a New Mexico accident in which a worker was injured by a pavement milling machine manufactured by the defendant. The plaintiff introduced evidence of similar accidents in other states to show that the defendant was aware of a dangerous design flaw in its product and had persisted in placing the flawed product on the market despite this awareness.

The Tenth Circuit approved because the evidence of out-of-state incidents was properly "offered to illustrate the reprehensibility of [the defendant's] conduct." *Id.* at 1253.

Smith v. Ingersoll-Rand Co. refutes CSX's assertion that the Tenth Circuit forbids reliance on evidence of out-of-state actions by a defendant for assessment of its reprehensibility. Nor is *Smith* alone in this regard. Many other state and federal courts since *Gore* have arrived at the same result. *See, e.g., Parsons v. First Investors Corp.*, 122 F.3d 525, 531 n.2 (8th Cir. 1997); *Neibel v. Trans World Assurance Co.*, 108 F.3d 1123, 1131 (9th Cir. 1997); *Jimenez v. Chrysler Corp.*, 74 F. Supp. 2d 548 (D.S.C. 1999); *Ex parte LifeUSA Ins. Co.*,

No. 1981504, 2000 Ala. LEXIS 159 (Ala. April 21, 2000); *Walston v. Monumental Life Ins. Co.*, 923 P.2d 456, 467 (Idaho 1996); *Schaeffer v. Edward D. Jones & Co.*, 552 N.W.2d 801 (S.D. 1996); *Owens-Corning v. Thompson*, No. 05-98-00231-CV, 2000 WL 764930 (Tex. App. June 14, 2000). The award of punitive damages in this case is fully consistent with this uniform body of case-law, which in turn stems directly from this Court's decisions *Gore* and *TXO*.

CONCLUSION

CSX's petition seeks to manufacture a decisional conflict over federal issues that were neither properly presented nor decided below. In fact, there is no relevant split of authority, and the consideration by the jury of CSX's reprehensible nationwide conduct, which was directly linked to the death of the plaintiff's husband, is fully consistent with this Court's decisions as well as with every other post-*Gore* decision addressing the issue.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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